01-799

Supreme Court, U.S.
FILED
OCT 23 2001
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

JOHNNY GREENE,

Petitioner,

v.

TENNESSEE DEPARTMENT OF CORRECTIONS,

Respondent.

ORIGINAL

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER A STATE PRISONER SEEKING RELIEF UNDER 28 U.S.C. § 2241, BUT NOT DIRECTLY OR INDIRECTLY CHALLENGING A STATE COURT CONVICTION OR SENTENCE, IS REQUIRED TO OBTAIN A CERTIFICATE OF APPEALABILITY BEFORE APPEALING?

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LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit whose judgment is sought to be reviewed in this case:

Johnny Greene
Tennessee Department of Corrections

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OPINIONS BELOW

On January 28, 2000, the United States District Court for the Middle District of Tennessee filed an order and accompanying memorandum granting the motion for summary judgment and is unpublished and has been reproduced in the Appendix at pp. 9a-16a. On March 5, 2000, the United States District Court for the Middle District of Tennessee filed an order denying a Certificate of Appealability and is unpublished and has been reproduced in the Appendix at p. 8a. The United States Court of Appeals for the Sixth Circuit held that a Certificate of Appealability was necessary to appeal and denied to issue a Certificate of Appealability and dismissed the appeal on September 7, 2001 and is unpublished and has been reproduced in the Appendix at pp. 1a-7a.

SUPREME COURT JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed on September 7, 2001, Appendix 1a-7a. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 2253.

STATUTORY PROVISIONS CONSTRUED

28 United States Code § 2241

28 United States Code § 2254

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STATEMENT OF THE CASE

On March 31, 1994, the Petitioner filed his Petition for Review in the Chancery Court for Davidson County, Tennessee contesting the Declaratory Order filed by the Department of Corrections involving the computation of his sentence and specifically the computation of sentence reduction credits. On June 15, 1994, the State filed a Motion to Dismiss. On June 22, 1994, the Petitioner filed an Answer opposing the Motion to Dismiss. On March 6, 1995, the Court overruled the Motion to Dismiss filed by the Respondent. After the Petitioner filed a Motion to Set Trial on June 8, 1995, the Respondent filed a Motion for Reconsideration or Identification of Question of Fact on June 28, 1995. On August 7, 1995, the Petitioner responded to the Respondent's motion.

On August 22, 1995, the Court entered a Memorandum and Order ordering the Tennessee Department of Corrections to state its reasons for denying the Petitioner's request for a Declaratory Order within 60 days. On October 23, 1995, the Respondent filed a statement of the Department of Corrections and an attachment. On December 11, 1995, the Petitioner filed a response to the statement of the Department of Corrections. On February 20, 1996, Petitioner filed a Motion for Summary Judgment. On February 22, 1996, the Respondent filed a Motion for Summary Judgment. On February 28, 1996, the Petitioner filed his response to the Respondent's Motion for Summary Judgment and on April 15, 1996, the Respondent filed its response to the Petitioner's Motion for Summary Judgment.

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On May 6, 1996, the Court entered its Order granting the Respondent's Motion for Summary Judgment. On May 24, 1996, the Petitioner filed his Notice of Appeal and designation of record to the Tennessee Court of Appeals. The Court of Appeals affirmed and remanded to the trial court on July 10, 1998. The Tennessee Supreme Court denied the Petitioner's Application for Permission to Appeal on October 19, 1998.

On October 21, 1999, the Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. On November 19, 1999, the Respondent filed a motion for summary judgment and accompanying memorandum. On November 29, 1999, the Petitioner filed his response. On January 28, 2000, the United States District Court for the Eastern District of Tennessee filed an order and accompanying memorandum granting the motion for summary judgment and is unpublished and has been reproduced in the Appendix at pp. 9a-16a. On February 14, 2000, the Petitioner filed his Notice of Appeal. On March 5, 2000, the United States District Court for the Middle District of Tennessee filed an order denying a Certificate of Appealability and is unpublished and has been reproduced in the Appendix at p. 8a. The United States Court of Appeals for the Sixth Circuit held that a Certificate of Appealability was necessary to appeal and denied to issue a Certificate of Appealability and dismissed the appeal on September 7, 2001 and is unpublished and has been reproduced in the Appendix at pp. 1a-7a.

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STATEMENT OF FACTS

The Petitioner Johnny Greene was convicted of murder on February 3, 1971, with a sentence effective date of August 28, 1970. At that time the sentence credit laws were based on an inmate's conduct and were codified at Tenn. Code Ann. § 41-332 which was the good behavior allowance and Tenn. Code Ann. § 41-334 which was the Honor grade-time allowance. Each provision provided for sentence reduction credits in the following manner:

> 41-332 – Good behavior allowance. Each convict who shall demean himself uprightly shall have deducted from the time for which he may have been sentenced, one (1) month for the first year, two (2) months for the second year, three (3) months for each subsequent year until the tenth year inclusive and four (4) months for each remaining year of the time of imprisonment. This shall apply to prisoners in confinement or on parole therefrom. [Acts 1932, Ch. 89, § 1; C. Supp. 1950, § 11708.1 (Williams, § 12209.01)].

Tenn. Code Ann. § 41-332 – Good behavior allowance, was automatically inherited upon conviction and computed into the sentence. On July 1, 1980, Tenn. Code Ann. § 41-332 was codified at Tenn. Code Ann. § 41-21-212, and amended with the following section added:

> (b) This section shall apply only to those persons convicted of an offense committed before July 1, 1981, and then only until such good behavior allowances are converted into good conduct sentence credits pursuant to Tenn. Code Ann. § 41-21-231. [Acts 1931, Ch. 89, § 1; C. Supp. 1950,

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§ 11780.1 (Williams, § 12209.1); Acts 1980, (Adj. S.), Ch. 805, § 5; (Orig. Ed.), § 41-332].

Tenn. Code Ann. § 41-334 – Honor grade-time allowance, adhered to a sentence upon conviction, and allowed an inmate to accrue additional credits at the rate of two (2) months per year of the time served, thereby reducing the presumptive expiration date. Tenn. Code Ann. § 41-334 – Honor grade-time allowance states:

> 41-334 – The said commissioner of correction shall have the right power to establish an honor grade in which convicts shall be placed when received at the prison. The allowance for honor grade shall be two (2) months of each year of the term of service. [Acts 1931, Ch. 89, § 2; 1943, Ch. 144, § 1; C. Supp. 1950, § 11780.2 (Williams, § 12209.2); Acts 1953, Ch. 164, § 2; impl. Am. Acts 1955, Ch. 102, § 1.]

On July 1, 1980, Tenn. Code Ann. § 41-334 was codified at Tenn. Code Ann. § 41-21-214, and amended with the following section added:

> (b) This section shall apply only to those persons convicted of an offense committed before July 1, 1981, and then only until such Honor grade-time allowance are converted into good conduct sentence credits pursuant to Tenn. Code Ann. § 41-21-231. [Acts 1931, Ch. 89, § 2; 1943, Ch. 144, § 1; impl. Am. Acts 1955, § 11780.2 (Williams, § 12209.20; Acts 1953, Ch. 164, § 1; impl. Am. Acts 1955, Ch. 102, § 1; 1980 (Adj.S.), Ch. 805, § 7; Tenn. Code Ann. (Orig. Ed.), § 41-334].

When Mr. Greene was taken into custody, an estimate of the maximum amount of Good and Honor time he could earn was calculated by taking the term of his sentence dividing it by one-half, and adding 13 months. This reduced his actual sentence expiration date of August 28, 2069 (1970 + 99 years) to a presumptive expiration date of March 3, 2021, as indicated on the reverse side of *"Verdict and Sentence Sheet"* of the Criminal Court of Davidson County, dated February 3, 1971. This information was also put on to a Classification Summary sheet when Mr. Greene was received at the State Penitentiary in Nashville on February 5, 1971.

From August 28, 1970 until September 1, 1972, Mr. Greene accrued sentence credits under Tenn. Code Ann. § 41-334 at the rate of two (2) months per year. On September 1, 1972, the Tennessee State Legislature enacted Tenn. Code Ann. § 41-358, Inmate Incentive Program – Education and Job Performance credits, in addition to Good and Honor time. This statute provided, in part:

> (a) The commissioner of correction shall develop an inmate incentive program whereby credit may be given toward the reduction of time that the inmate is required to serve for the inmates' participation in academic and vocational education classes sponsored by the department of correction and for above average performance in the inmate's job placement, on the basis of a rating system devised by the commissioner.
>
> (b) Such reduction of sentence shall be in addition to the reduction authorized for good

behavior by § 41-332, and the reduction authorized for honor time by § 41-334.

(c) The program shall include procedures whereby credit shall be given on the basis of one (1) day of credit for each six (6) days in which the inmate has maintained a rating of above average in the inmate's job placement.

(d) Such credit shall apply during the first ten-(10) years of an inmate's term. During the eleventh and subsequent years of an inmate's term, credit may be earned at the rate of two (2) days for each six (6) days of academic or vocational participation or above average job performance.

(e) Credits earned shall be subject to the following limitations:

IV. During the first year of the sentence, a maximum of thirty (30) days may be earned.

V. During the second through the tenth year, a maximum of sixty (60) days a year may be earned.

VI. During the eleventh and subsequent years, a maximum of ninety (90) days a year may be earned . . .

(f) Credit earned under the program may be taken away in the same manner and for the same reasons as good and honor time may be taken away under authority of Tenn. Code Ann. § 41-335. [Acts 1972 (Adj. S.), Ch. 705, § 1.]

Under the above provision, and because he was in the second year of his incarceration, Mr. Greene started accruing sixty (60) days per year in addition to the two (2) months per year he was already receiving under § 41-334. Upon reaching the eleventh year of his incarceration, Mr. Greene started earning ninety (90) days per year, for a total of five (5) months per year.

On September 1, 1980, the Tennessee State Legislature enacted Tenn. Code Ann. § 41-21-230, Prisoner performance sentence credits. This statute provided in part:

> (c) The sentence credits that can be earned pursuant to this section shall be in addition to any other sentence credits authorized by law. [Acts 1980 (Adj. S.), Ch. 805, § 2; Tenn. Code Ann., § 41-360.]

Pursuant to the above section, Mr. Greene started earning twelve (12) days per month, due to his security designation, for a total of one hundred forty-four (144) days per year, in addition to the previous sections of Tenn. Code Ann. § 41-334 and § 41-358. All inmates were receiving the benefit of these credits in a cumulative manner until the Conversion pursuant to Tenn. Code Ann. § 41-21-231 was implemented on July 1, 1981. The Department of Corrections has made the claim that on September 1, 1980, Tenn. Code Ann. § 41-358 was repealed and replaced by the enactment of Tenn. Code Ann. § 41-21-230, Prisoner performance sentence credits. There is no language in the statute which implies or expressly states that Tenn. Code Ann. § 41-21-230 repealed or replaced Tenn. Code Ann. § 41-358, the repeal came about in 1985.

On July 1, 1981, Good and Honor time was replaced by Good Conduct Sentence Credit pursuant to Tenn. Code Ann. § 41-21-229, which provides, in part:

> (a) Prisoners admitted after July 1, 1981, shall accrue good time based upon their classification in the following manner:
>
> (1) Class I prisoner shall receive thirty (30) days credit for each month of the sentence served . . . from the eleventh calendar year of a prisoner's sentence, a prisoner shall be classified as a Class I prisoner.

Considering the fact that Tenn. Code Ann. § 41-21-229 was enacted in 1980, with the effective date of July 1, 1981, it could not have replaced Tenn. Code Ann. §§ 41-332, 41-334 and 41-358, otherwise the language would have been very clear in the enactment as passed by the Tennessee State Legislature. As a matter of fact, Tenn. Code Ann. §§ 41-332 and 41-334 was repealed on July 1, 1980, with the effective date being July 1, 1981, and as a direct result of Tenn. Code Ann. § 41-21-231, Conversion system. The Conversion system allowed the Department of Corrections to go from a system of awarding a lump sum of credit days in the form of Good and Honor time, to a system where Good Conduct Sentence Credits must be earned.

The Department of Corrections, through administrative interpretation, performed an illegal act when it arbitrarily switched over and included all prisoner's convicted prior to July 1, 1981, violating the "Ex Post Facto" provisions of the Tennessee State Constitution and the United States Constitution.

Tenn. Code Ann. § 41-21-231, Conversion system, provided that Good and Honor time credit earned prior to July 1, 1981, would be proportionately converted to Good Conduct Sentence Credit, and from that time forward, prisoners would earn Good Conduct Sentence credits, but could no longer earn Good and Honor time.

However, Mr. Greene had acquired Good and Honor time by the mere fact that he was convicted under the applicable provisions of Tenn. Code Ann. §§ 41-332; 41-334. Those credits became a part of his sentence upon conviction and were computed as such. To apply the sections of Tenn. Code Ann. § 41-332 (41-21-212); 41-334 (41-21-334) and 41-358 (41-21-228) as amended in 1980, would be applying an added sanction, which is disadvantageous in that Tenn. Code Ann. § 41-21-231 deprives one from earning credits previously available. Mr. Greene is currently accruing sentence credits pursuant to Tenn. Code Ann. § 41-21-230, Prisoner performance sentence credit, and has been since September 1, 1980.

Tennessee Code Annotated § 41-21-231, Conversion system for credits earned before July 1, 1981, cannot apply to Mr. Greene because he did not sign a waiver for the original sentence to be converted as specified by law. For the Department to make the change in an arbitrary fashion, and in so doing, summarily divest one of the credits which was automatically computed into the sentence imposed, and summarily divest one of the credits earned up until that point without fully informing the individual through some form of due process, imposes more burdensome penalties in violation of the Constitution.

As late as 1989, the legislative intent has been, and remains clear. Tennessee Code Annotated § 41-21-236(g), states, in part:

> (g) The department authorized to continue the application of previously enacted sentence credit systems formerly codified in §§ 41-21-212 [repealed], 41-21-213 [repealed], 41-21-214 [repealed], 41-21-215 [repealed], 41-21-228 [repealed], 41-21-229 [repealed], 41-21-230 [repealed], 41-21-231 [repealed], 41-21-232 [repealed], and 41-21-233 [repealed], to any inmates to whom they currently apply and who do not sign written waivers as provided in subsection (c). Any sentence credits earned or awarded under such previously enacted systems shall remain in full force and effect unless and until they are taken away in accordance with the procedures established by such previously enacted systems.

Mr. Greene is entitled to the statutory provisions of Tenn. Code Ann. §§ 41-332, 41-334 and 41-358, in a cumulative manner as implied or expressly stated, in the respective sections, as a matter of law. (A schedule of credits accrued prior to July 1, 1981 is included in the Appendix at p. 17a.)

SUMMARY OF ARGUMENT

In a split among the circuits as to whether a state prisoner seeking relief under 28 U.S.C. § 2241, but not directly or indirectly challenging a state court conviction

or sentence is required to obtain a Certificate of Appealability before appealing, the Petitioner submits that the Supreme Court should side with the Seventh Circuit in holding that a Certificate of Appealability is not necessary. *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000)

ARGUMENT

I. WHETHER A STATE PRISONER SEEKING RELIEF UNDER 28 U.S.C. § 2241, BUT NOT DIRECTLY OR INDIRECTLY CHALLENGING A STATE COURT CONVICTION OR SENTENCE, IS REQUIRED TO OBTAIN A CERTIFICATE OF APPEALABILITY BEFORE APPEALING?

The Petitioner brought this matter in the United States District Court for the Middle District of Tennessee challenging the legality of proceedings of a state administrative agency, that is the Tennessee Department of Corrections in computing his sentence. He is not challenging the conviction or judgment from the state court. Because this matter is brought pursuant to 28 U.S.C. § 2241 and not § 2254, there should be no Certificate of Appealability required in order for the Petitioner to proceed on appeal.

The Seventh Circuit so reasoned in *Walker v. O'Brien*, 216 F.3d 626 (7th Cir. 2000). The Court held:

> When a prisoner loses good-time credits after a prison disciplinary proceeding, the result and detention does not arise out of process issued by a state court. At 637.

The Tenth, Fifth and now the Sixth Circuit in the instant case, reached the opposite result. *Montez v.*

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McKinna, 208 F.3d 862, 867 (10th Cir. 2000); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998).

The Petitioner asks this Court to strictly interpret the statute as it is written, requiring no Certificate of Appealability.

CONCLUSION

The Petitioner respectfully requests this Court to hold that a Certificate of Appealability is not necessary and remand the matter to the Court of Appeals to be docketed as a regular appeal.

Respectfully submitted,

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APPENDIX

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Johnny Greene,

Petitioner-Appellant,

v.

No. 00-5237

Tennessee Department of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

No. 99-00988 – Todd J. Campbell, District Judge.

Submitted: July 12, 2001

Decided and Filed: September 7, 2001

Before: SILER and GILMAN, Circuit Judges;
GIBBONS, District Judge.*

COUNSEL

ON BRIEF: Douglas A. Trant, Knoxville, Tennessee, for Appellant. David H. Findley, Office of the Attorney General, Criminal Justice Division, Nashville, Tennessee, for Appellee.

---

* The Honorable Julia Smith Gibbons, United States District Judge for the Western District of Tennessee, sitting by designation.

OPINION

SILER, Circuit Judge. Petitioner Johnny Greene, a Tennessee state prisoner, filed a motion with this court seeking the right to appeal, notwithstanding the district court's denial of a certificate of appealability ("COA"), the lower courts's summary judgment for respondent, the Tennessee Department of Corrections ("TDC"), on his petition for a writ of *habeas corpus* filed under 28 U.S.C. §2241.[1] TDC did not respond to his motion, and it was granted. TDC then filed a motion to reconsider, alleging that 28 U.S.C. § 2253[2] and Rule 22, Federal Rules of Appellate Procedure, require that Greene secure a COA in order to take an appeal to this court.

---

[1] Greene's petition alleged that the denial of double sentencing credits under Tennessee's current and former sentencing credit incentive programs violated the Ex Post Facto clause and his due process rights.

[2] 28 U.S.C. § 2253 provides, in relevant part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

* * *

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The key issue is whether a state prisoner seeking relief under § 2241, but not directly or indirectly challenging a state court conviction or sentence, is required to obtain a COA before appealing. For the reasons stated hereafter, we conclude that a state prisoner incarcerated pursuant to a state conviction who seeks *habeas* relief under § 2241 must obtain a COA before appealing to this court, and therefore GRANT TDC's motion to reconsider, VACATE the order granting Greene leave to proceed without a COA, and DISMISS his appeal.

BACKGROUND

In 1971, Greene was convicted of first degree murder and sentenced to serve ninety-nine years in state prison. In 1994, Greene's counsel wrote a letter to the TDC asserting that he was eligible for immediate release because he had been earning sentence credits at a rate of 49.5 days per month since his incarceration. The TDC informed him that he was not entitled to receive double credits under Tennessee's successive sentence reduction programs. Greene then filed a petition for a declaratory order with the TDC. TDC declined Greene's request for the declaratory order. He then reasserted the action in Davidson County Chancery Court, which granted summary judgment to TDC. Greene appealed and the Tennessee Court of Appeals affirmed. The Tennessee Supreme Court denied Greene's application for permission to appeal.

Greene then filed a petition for a writ of *habeas corpus* under 28 U.S.C. § 2241 in the district court. The TDC filed a motion for summary judgment, alleging that Greene had failed to create any genuine issue of material fact as

to his Ex Post Facto and due process claims, and that he had failed to meet the standard for challenging state court determinations as required by 28 U.S.C. § 2254(d). The district court granted the motion, holding that no genuine issue of material fact existed, but declining to rule on whether Greene's petition should be construed as filed under § 2254. The district court denied a COA.

DISCUSSION

Greene argues that he may appeal without a COA because his § 2241 petition challenged the legality of proceedings of a state administrative agency, TDC, and thus, his appeal is not from "the final order in a habeas corpus proceeding *in which the detention complained of arises out of process issued by a State court.*" 28 U.S.C. § 2253(c)(1)(A) (emphasis added).

This position is arguably consistent with *Walker v. O'Brien*, 216 F.3d 626, 637 (7th Cir. 2000), a § 2241 case in which the court held that a COA was not necessary because, "[w]hen a prisoner loses good-time credits after a prison disciplinary proceeding, the resulting detention does not arise out of process issued by a state court." The opposite result was reached in *Montez v. McKinna*, 208 F.3d 862, 867 (10th Cir. 2000), where the court stated: "consistent with the plain language of § 2253(c)(1)(A), this court holds that a state prisoner must obtain a COA to appeal the denial of a habeas petition, whether such petition was filed pursuant to § 2254 or § 2241, whenever 'the detention complained of [in the petition] arises out of process issued by a State court.'" *Id.* (citing

§ 2253(c)(1)(A); *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998)).

Prior to deciding the COA issue, the *Walker* court held that:

> *Felker* leads to the conclusion that when a prisoner begins in the district court, §2254 and all associated statutory requirements [including COA's under §2253, if applicable] apply no matter what statutory label the prisoner has given the case. (Roughly speaking, this makes §2254 the exclusive vehicle for prisoners in custody pursuant to a state court judgment who wish to challenge anything affecting that custody, because it makes clear that bringing an action under §2241 will not permit the prisoner to evade the requirements of §2254.) Indeed, we have held in numerous cases that §2254 was the correct vehicle for contesting loss of good time credit in prison disciplinary proceedings, and we adhere to those decisions today.

Id. at 633 (relying on *Felker v. Turpin*, 518 U.S. 651 (1986)) (citations omitted). We agree with this part of the *Walker* opinion.

The *Montez* court relied upon the broad language, "the detention complained of arises out of process issued by a State court," in § 2253(c)(1)(A) to determine that the COA requirement was generally applicable to § 2241 petitions filed by state prisoners. The decisions in *Walker* and *Montez* were based upon different constructions of this phrase.

Walker held, "[i]n light of the statutory language, we do not see how we can construe the words 'process

issued by a State court' to mean 'process not issued by a State court, but instead the outcome of an internal prison disciplinary proceeding.' " *Id.* at 637. The difficulty we have with this construction is that it narrows the phrase in § 2253(c)(1)(A) that gives it breadth – "arises out of."

A plain reading, noting the breadth created by this phrase, was the basis for the *Montez* court's resolution of the issue and is also the position of the Fifth Circuit. *See id.* at 867; *Stringer v. Williams*, 161 F.3d 259, 262 (5th Cir. 1998) (holding that, in the context of a pretrial detainee filing a petition under § 2241, "§ 2253 clearly does not encompass challenges to federal detention under § 2241. Just as clearly, however, § 2253 does encompass challenges to state detention under § 2241, since 'the detention complained of arises out of process issued by a State court.' ").

If a state prisoner has been convicted in state court, is thereby incarcerated, and then files a § 2241 petition complaining about the condition or circumstances of that incarceration, then logic tells us that the person is detained because of a process issued (a conviction) by a State court. When it is clear that the detention results from a State court conviction, the habeas petition arises from the genesis of custody – the State conviction.

Accordingly, we agree with the Fifth and Tenth Circuits' construction of this plain and broad language and hold that a state prisoner who appeals the resolution of a § 2241 petition, such as is involved here, is required to first obtain a COA under § 2253(c)(1)(A).

We therefore decline to address the merits of Greene's *habeas* claims and GRANT TDC's motion to

reconsider, VACATE the order granting Greene leave to proceed with his appeal without a COA, and DISMISS his appeal.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHNNY GREENE	)	
	)	
V.	)	No. 3:99-0988
TENNESSEE DEPARTMENT OF CORRECTION	)	JUDGE CAMPBELL

ORDER

The Court is in receipt of a Letter from the Sixth Circuit Court of Appeals, dated March 1, 2000, which indicates that this court has not determined whether any issue involved in this case should be certified for appeal. Having reviewed the issues involved in this case, the Court declines to certify the case for appeal because the Petitioner has failed to make a substantial showing of the denial of a constitutional right.

The clerk is directed to transmit a copy of this Order to the Sixth Circuit Court of Appeals.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHNNY GREENE	)	
	)	
V.	)	No. 3:99-0988
TENNESSEE DEPARTMENT OF CORRECTION	)	JUDGE CAMPBELL

ORDER

Pending before the Court is Respondents' Motion For Summary Judgment (Docket No. 4). For the reasons set forth in the accompanying Memorandum, the Motion is GRANTED, and this case is DISMISSED.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JOHNNY GREENE	)	
	)	
V.	)	No. 3:99-0988
TENNESSEE DEPARTMENT OF CORRECTION	)	JUDGE CAMPBELL

MEMORANDUM

I. Introduction

Pending before the Court is Respondents' Motion For Summary Judgment (Docket No. 4). For the reasons set forth below, the Motion is GRANTED, and this case is DISMISSED.

II. Factual and Procedural Background

According to the Petition, the Petitioner was convicted of murder on February 3, 1971, with a sentence effective date of August 28, 1970. (Petition, at 4 (Docket No. 1)). Petitioner earned sentencing credits under certain sentencing credit programs in effect at that time until those programs were modified through legislation enacted in 1980. (*Id.*) Petitioner argues that the Respondent's failure to continue to award him sentencing credits under the previous system violates the Ex Post Facto provisions of Article I, Sections 9 and 10 of the United States Constitution, as well as the Due Process Clauses of the Fifth and Fourteenth Amendments. (*Id.*)

Petitioner also alleges that he has exhausted his state court remedies. (*Id.*)

Through its Motion For Summary Judgment, Respondent argues that it is entitled to judgment based on the application of 28 U.S.C. § 2254(d) to this case, which provides that the Court should apply certain presumptions to state court adjudications. Petitioner filed a Response to the Motion (Docket No. 7), in which he contends that, because this action was filed under 28 U.S.C. § 2241, the provisions of Section 2254(d) do not apply. In its two-page Reply (Docket No. 11), the Respondent takes the position that, because Petitioner is a state prisoner, his Petition is governed by the provisions of Section 2254, even though the Petitioner did not seek relief under that provision.

Because the Respondent has not provided the Court with adequate argument regarding this procedural issue, the Court will not address it, and will not apply the provisions of Section 2254 in evaluating the merits of Petitioner's claims. Nevertheless, the Court concludes that Respondent is entitled to summary judgment on Petitioner's claims.

III. The Standards for Considering Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment may be rendered if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In order to prevail, the movant has the burden of proving the absence of a genuine issue of material fact as

to an essential element of the opposing party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 202 (1986). In determining whether the movant has met its burden, the Court must view the evidence in the light most favorable to the nonmoving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In order to defeat the motion, the nonmoving party is required to show, after an adequate time for discovery, that there is a genuine issue of fact as to every essential element of that party's case upon which he will bear the burden of proof at trial. *Celotex Corp.*, 106 S.Ct. at 2553. In order to create a genuine factual issue, the nonmoving party must show "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Although the nonmovant need not show that the disputed issue should be resolved in his favor, he must demonstrate that there are genuine factual issues that "properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*

A preponderance of the evidence standard is used in this determination. *Id.* Therefore, if the evidence offered by the nonmoving party is "merely colorable," or "is not significantly probative," the motion for summary judgment may be granted. *Id. See also Matsushita Electric*, 106 S.Ct. at 1356.

IV. Analysis

When Petitioner was convicted in February, 1971, inmates in Tennessee earned reductions in their sentence through application of Tennessee Code Annotated Section 41-332 (later designated as 41-21-212), entitled "Good Behavior Allowance," and Tennessee Code Annotated Section 41-334 (later designated as 41-21-214), entitled "Honor Grade – Time Allowance." In 1980, the legislature enacted a new sentencing credit statute, Tennessee Code Annotated Section 41-359 (later designated as 41-21-229), and specified the method by which previously-earned good conduct credits would be converted to the new system, Tennessee Code Annotated Section 41-361 (later designated as 41-21-231). Upon conversion, prisoners were awarded sentencing credits under the new statute. Tenn. Code Ann. § 41-21-231.[1]

The Tennessee Court of Appeals has held that the 1980 program completely replaced the previous program. *Jones v. Reynolds*, 1997 WL 367661 (Tenn. Ct. App. July 2, 1997). Petitioner argues, however, that he is entitled to earn sentencing credits under both sentencing credit statutes.

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[1] In 1985, the legislature enacted another sentencing credit statute, Tennessee Code Annotated Section 41-21-236, which provided that the new system would not be applied to prisoners who committed felonies prior to December 11, 1985 unless the prisoner signed a written waiver of his right to serve his sentence under the law in effect at the time he committed the crime. Tenn. Code Ann. §§ 41-21-236(c)(3), (g). Previously enacted sentence credit programs would apply to such prisoners who elected not to sign a waiver. *Id.*

In addition to "good conduct" sentencing credits, prisoners could also earn sentencing credit for participation in academic and vocational education classes as a result of a statute enacted in 1972. Tenn. Code Ann. § 41-358. In 1980, the legislature enacted another incentive program whereby prisoners could earn "prisoner performance sentence credits." Tenn. Code Ann. § 41-360 (later designated 41-21-230).[2]

The Tennessee Court of Appeals has held that the incentive program enacted in 1980 repealed the previous incentive program enacted in 1972. *Jones v. Reynolds*, 1997 WL 367661 (Tenn. Ct. App. July 2, 1997). Petitioner argues, however, that he is entitled to earn sentencing credits under both incentive programs.

Petitioner appears to argue that the Department of Correction's determination, which is consistent with the Tennessee Court of Appeals' decision, that Petitioner is not entitled to earn credits under the 1972 sentencing credit statutes, as well as the 1980 sentencing credit statutes, violates the Ex Post Facto Clause and his due process rights.[3]

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[2] In 1985, the legislature repealed the 1980 incentive program for prisoners who committed felonies after December 11, 1985. Tenn. Code Ann. §§ 41-21-236(c)(3), (g).

[3] Petitioner also argues that he is entitled to "3,722 days of Good and Honor time which had been accrued prior to July 1, 1981." (Petition, at 13 (Docket No. 1)). He has provided no evidence to support this allegation in response to the Respondent's Motion For Summary Judgment. Therefore, the Court concludes that the Respondent is entitled to summary judgment as to this issue. *Celotex Corp.*, 106 S.Ct. at 2553.

The Supreme Court has explained that to fall within the ex post facto prohibition, "a law must be retrospective – that is 'it must apply to events occurring before its enactment' – and it 'must disadvantage the offender affected by it' . . . by altering the definition of criminal conduct or increasing the punishment for the crime . . . " *Lynce v. Mathis*, 519 U.S. 433, 117 S.Ct. 891, 896, 137 L.Ed.2d 63 (1997) (citations omitted). Statutes reducing the availability of "good time" credits violate the ex post facto prohibition if applied to a prisoner whose crime was committed before the effective date of the statute. *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

Petitioner has simply not created a genuine issue of material fact that the 1980 sentencing credit statutes violate the Ex Post Facto Clause. Although the 1980 statute operated retrospectively when applied to the Petitioner, the Petitioner has not offered any evidence or argument that application of the 1980 sentencing credit programs reduced the number of credits he was earning under the old system, and thereby increased his sentence.

To the extent Petitioner argues that he is entitled to earn essentially "double credits" under both sentencing credit programs, he has offered no authority to support his argument that Respondent's failure to award him "double credits" violates his due process rights or the ex post facto prohibition.

V. Conclusion

For the reasons set forth above, the Motion For Summary Judgment is GRANTED, and this case is DISMISSED.

It is so ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

SCHEDULE OF CREDITS ACCRUED PRIOR TO JULY 1, 1981

Year	41-334	41-358	41-21-230	Total Per Year
1	2 mo.	60 days		4 mo.
2	2 mo.	60 days		4 mo.
3	2 mo.	60 days		4 mo.
4	2 mo.	60 days		4 mo.
5	2 mo.	60 days		4 mo.
6	2 mo.	60 days		4 mo.
7	2 mo.	60 days		4 mo.
8	2 mo.	60 days		4 mo.
9	2 mo.	60 days		4 mo.
10	2 mo.	60 days	36 days	5 mo. 6 days
11	2 mo.	90 days	144 days	9 mo. 24 days
TOTALS	22 mo. equals (660 days)	690 days	180 days	51 mo. equals (1530 days) = 4.1917808 years

POST CONVERSION, 1981

12	2 mo.	90 days	144 days	9 mo. 24 days
13	2 mo.	90 days	144 days	9 mo. 24 days
14	2 mo.	90 days	144 days	9 mo. 24 days
15	2 mo.	90 days	144 days	9 mo. 24 days
16	2 mo.	90 days	144 days	9 mo. 24 days
17	2 mo.	90 days	144 days	9 mo. 24 days
18	2 mo.	90 days	144 days	9 mo. 24 days
19	2 mo.	90 days	144 days	9 mo. 24 days
20	2 mo.	90 days	144 days	9 mo. 24 days
21	2 mo.	90 days	144 days	9 mo. 24 days
22	2 mo.	90 days	144 days	9 mo. 24 days
23	2 mo.	90 days	144 days	9 mo. 24 days
24	2 mo.	90 days	144 days	9 mo. 24 days
25	2 mo.	90 days	144 days	9 mo. 24 days
26	2 mo.	90 days	144 days	9 mo. 24 days
27	2 mo.	90 days	144 days	9 mo. 24 days
28	2 mo.	90 days	144 days	9 mo. 24 days
29	2 mo.	90 days	144 days	9 mo. 24 days
TOTALS	36 mo. equals (1080 days)	1620 days	(2592 days)*	162 mo.+ 432 days= 163 mo.+ 67 days= 5292 days equals 14.49863 years

*Average of 12 days per month. This does not reflect lost credits due to disciplinaries.

Applicable credits: 4.1917808 years plus 14.49863 years equals 18.69041 years.

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